BRB Nos. 07-0337 BLA
and 07-0337 BLA-A

D.H. (Widow of C.H.) Claimant-Respondent v. DEBY COAL COMPANY, INCORPORATED and BITUMINOUS CAUSALTY CORPORATION c/o OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Cross-Petitioners/Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner/Cross-Respondent	)	DATE ISSUED: 01/31/2008 DECISION and ORDER

Appeal of the Order Granting Motion to Dismiss Carrier and Remand to Director of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for carrier.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and carrier cross-appeals the Order Granting Motion to Dismiss Carrier and Remand to Director (2005-BLA-5829 and 2005-BLA-5830) issued by Administrative Law Judge Thomas F. Phalen, Jr., on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). At issue is whether carrier is liable for the payment of benefits with respect to the deceased miner's claim filed on February 17, 2004, and a survivor's claim filed by claimant on April 16, 2004. Director's Exhibits 4, 43.

The procedural history of the case is as follows. The miner originally filed a Part B claim for benefits with the Social Security Administration (SSA) on August 9, 1970, which was denied on April 14, 1976. Director's Exhibit 1-93, 1-108. On May 7, 1976, the miner filed a Part C claim with the Department of Labor (DOL). Director's Exhibit 1-164. While the Part C claim was pending, the miner also filed an election card on March 30, 1978, requesting review of his denied Part B claim by SSA. Director's Exhibit 1-92. The SSA again denied benefits and automatically forwarded the Part B claim to the DOL for further review. The DOL subsequently merged the denied Part B claim with the pending Part C claim, and denied benefits on January 25, 1980. Director's Exhibit 1-122. The miner requested a hearing and the matter was forwarded to the Office of Administrative Law Judges (OALJ). Director's Exhibits 1-88, 1-120. On June 28, 1982, employer filed a motion requesting that it be dismissed as a party to the claim, alleging that based on the procedural history of the miner's Part B claim, any award of benefits issued to claimant under Section 435 of the Act would have to be paid by the Black Lung Disability Trust Fund (the Trust Fund). Director's Exhibits 1-78. By Order dated September 9, 1982, Administrative Law Judge William H. Dapper granted employer's motion and dismissed it as a party to the claim. Director's Exhibit 1-74. Thereafter, a Decision and Order denying benefits was issued by Administrative Law Judge Charles W. Campbell on January 23, 1985, and that decision was affirmed by the Board on appeal. *[C.F.] v. Director, OWCP*, BRB No. 85-0263 BLA (Jan. 16, 1987) (unpub.); Director's Exhibits 1-14, 1-20.

The miner filed a duplicate claim on July 28, 1994. Director's Exhibit 2-78. The district director issued a notice of claim to employer and carrier on December 5, 1994. Director's Exhibit 2-21. On January 9, 1995, the district director denied benefits. Director's Exhibit 2-5. The miner took no further action with regard to his duplicate claim and the file was administratively closed.

The miner next filed a subsequent claim on February 17, 2004. Director's Exhibit 4. While the case was pending, the miner died on March 30, 2004. In a letter dated April 9, 2004, carrier asserted that it was not liable for the payment of benefits since the miner's last date of coal mine employment occurred prior to its coverage period of September 1973 to September 1978, and since liability for the miner's original claim had been transferred to the Trust Fund. Director's Exhibit 28. On April 13, 2004, the district director rejected carrier's assertion that it was not liable for benefits. Director's Exhibit 30. Claimant then filed her survivor's claim on April 16, 2004. Director's Exhibit 43. On January 7, 2005, the district director issued a Proposed Decision and Order denying benefits in both the miner's claim and the survivor's claim on the grounds that the evidence was insufficient to establish that miner suffered from pneumoconiosis, that he was totally disabled due to pneumoconiosis, and that his death was due to pneumoconiosis. Director's Exhibit 38. Claimant requested a hearing, and the claims were consolidated and forwarded to the Office of Administrative Law Judges.

On June 26, 2006, carrier filed a motion to be dismissed as a party to the claim. As grounds for its motion, carrier alleged that: 1) it was previously dismissed as a party to the miner's original claim; 2) the case qualified as a special claim fund case as outlined in 20 C.F.R. §725.496; and 3) there was no coverage for the miner as of the last date of his coal mine employment with employer. The Director did not file a written response to carrier's motion; however, at a hearing held on July 27, 2006 before Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), the Director challenged carrier's motion and requested the opportunity to file a post-hearing brief. The administrative law judge granted the Director's request, and the record was held open in order for the parties to prepare briefs. After receipt of the parties' briefs, the administrative law judge issued his Order Granting Motion to Dismiss Carrier and Remand to Director (Order). The administrative law judge determined that because the miner's original claim fell within the transfer provisions of 20 C.F.R. §725.496, he was required to dismiss carrier as liable for benefits with the respect to the miner's subsequent claim and the survivor's claim pursuant to 20 C.F.R. §725.497.[1] The administrative law

[1] Section 725.497(c) provides:

> If it is determined that a coal mine operator or insurance carrier which previously participated in the consideration or adjudication of any claim may no longer be found liable for the payment of benefits to the claimant by reason of [S]ection 205 of the Black Lung Benefits Amendments of 1981, such operator or carrier shall be promptly dismissed as a party to the claim.

20 C.F.R. §725.497(c).

judge also specifically rejected the Director's argument that 20 C.F.R. §726.203 was the governing regulation and required carrier to assume liability for benefits. Although the administrative law judge stated that under Section 726.203, "one could argue [that carrier] assumed liability for the miner's [alleged pneumoconiosis] which may have occurred before 1973," he also found that Section 726.203 could be "construed to conflict with Section 725.496" and thus, the administrative law judge determined that the only way the two regulations could work in harmony together was to conclude that the transfer provisions of Section 725.496 exempt carrier from liability under Section 726.203. Order at 4-5. Accordingly, the administrative law judge ordered that carrier be dismissed from liability in both the miner's subsequent claim and the survivor's claim, and remanded the case to the Director "so that he may develop the record to present his case." Order at 5.

On appeal, the Director asserts that the administrative law judge erred in dismissing carrier pursuant to Section 725.496(f). The Director requests that the Board reverse the administrative law judge's Order, reinstate carrier as a party to these proceedings and remand the case to the administrative law judge for consideration of the miner's and survivors' entitlement to benefits. Carrier has filed a combined Cross-Petition for Review and Response Brief (Carrier's Combined Brief). Carrier initially asserts that the Director did not establish good cause for failing to timely respond to carrier's motion to dismiss before the administrative law judge. Carrier concedes that administrative law judge erred in relying on Section 725.496(f) as grounds for his Order, but urges the Board to affirm his dismissal of carrier on alternative grounds: 1) there is no valid basis for imposing liability on carrier when there is no dispute that employer was not insured by carrier on the date of the miner's last exposure, and carrier did not provide coverage to employer as of the date the miner filed his subsequent claim; 2) the DOL's theory to hold carrier liable in this case represents an improper attempt to impose retroactive liability for benefits contrary to the law; 3) the doctrine of collateral estoppel precludes DOL from naming carrier as liable for benefits in the miner's subsequent claim and the survivor's claim, based on its concession that liability for the original SSA claim was subject to transfer to the Trust Fund; and 4) since the miner's subsequent claim and the survivor's claim are merely derivative of the original miner's Part B claim, they should also be subject to transfer.

The Director responds to Carrier's Combined Brief, asserting that carrier is liable for benefits pursuant to Section 726.203(a), since claimant "first filed" a DOL claim for benefits against employer on May 7, 1976, which date falls within the coverage period of carrier's policy with the insured operator (September 1973 –September 1978). Director's

Reply Brief at 1. Carrier has also filed a reply brief, in which it asserts that the first claim filed by the miner for purposes of Section 726.203(a) is the 1970 SSA claim.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Order, the briefs of the parties, the procedural history of the claims, and the relevant regulatory criteria, we reverse the administrative law judge's Order dismissing carrier from liability for benefits.[3]

The parties are in agreement that the administrative law judge erred in dismissing carrier from liability for benefits based on application of the transfer provisions of Section 725.496. The Black Lung Benefits Reform Act of 1977 transferred liability for payment of certain special claims from operators and carriers to the Trust Fund. These provisions apply to claims which were denied before March 1, 1978, and which have been, or will be, approved under section 435 of the Act. The provisions at Section 725.496(b) identify the following claims as eligible for transfer of liability to the Trust Fund:

---

[2] The administrative law judge rejected the Director's argument that carrier could not be dismissed as a party to the claim without the consent of the Director pursuant to 20 C.F.R. §725.496(b). In so doing, the administrative law judge determined that Section 725.496(b) pertains only to the dismissal of responsible operators, and is not applicable to an insurance carrier as the regulation does not specifically reference the word "carrier." Although the Director does not challenge the administrative law judge's interpretation of Section 725.496(b) in this appeal, counsel for carrier preserves its general objection to the validity of Section 725.496. Employer's Combined Brief in Support of Cross-Petition for Review and in Response to the Director's Petition for Review at 5 n.2.

[3] Contrary to employer's contention, as 20 C.F.R. §725.455 affords the administrative law judge considerable discretion in the conduct of the hearing and the resolution of procedural matters, we affirm the administrative law judge's finding that counsel for the Director demonstrated good cause for failing to file a written objection to employer's motion to dismiss within ten days of receipt of that motion as required by 29 C.F.R. §18.6. 20 C.F.R. §725.455; Decision and Order at 3. Thus, we also conclude that the administrative law judge permissibly accepted the Director's written response to employer's motion post-hearing.

> (1) Claims filed with and denied by [SSA] prior to March 1, 1978;
>
> (2) Claims filed with [DOL] in which the claimant was notified by the Department of an administrative or informal denial before March 1, 1977, and in which the claimant did not within one year of such notification:
>
> > (i) request a hearing; or
> >
> > (ii) present additional evidence; or
> >
> > (iii) indicate an intention to present additional evidence; or
> >
> > (iv) request a modification or reconsideration of the denial on the ground of a change in condition or because of a mistake in a determination of fact.
>
> (3) Claims filed with the Department of Labor and denied under the law in effect prior to the enactment of the Black Lung Benefits Reform Act of 1977 (prior to March 1, 1978) following a formal hearing before an Administrative Law Judge, an administrative review before the Benefits Review Board, or before a United States Court of Appeals….

20 C.F.R. §725.496(b).

The regulation further provides that the procedural histories of multiple claims are to be considered separately to determine whether the transfer provisions apply, unless such claims were required to be merged by the agency's regulations. 20 C.F.R. §725.496(c). The merger provision of Section 725.309(b) states that "[i]f a claimant files a claim under this part *while another claim filed by the claimant is pending*, the later claim shall be merged with the earlier claim for all purposes." 20 C.F.R. §725.309(b) (emphasis added). However, "if a claimant files a claim … more than one year after the effective date of a final order denying a claim previously flied by claimant … the later claim shall be considered a subsequent claim for benefits." 20 C.F.R. §725.309(d). Thus, it is clear that a later claim cannot be merged with an earlier claim that has been finally denied. 20 C.F.R. §725.309(b), (d). The earlier claim must still be pending. *Hagerman v. Island Creek Coal Co.*, 11 BLR. 1-116 (1988).

In this case, the miner's original Part B claim, filed with the SSA, which was subject to transfer under the criteria of Section 725.496, was finally denied by the Board on January 16, 1987, and the case was administratively closed. Contrary to the administrative law judge's finding, the miner's subsequent claim filed on February 17, 2004, and the survivor's claim filed on April 16, 2004, do not meet the criteria for transfer set forth at Section 725.496, as these claim were not denied prior to March 1, 1978. Moreover, these claims are not eligible for merger into the miner's Part B claim

pursuant to Section 725.309(b), as the earlier claim has been finally denied. *See Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997). We, therefore, hold that the administrative law judge erred in transferring liability for benefits in the miner's subsequent claim and the survivor's claim to the Trust Fund by relying on Section 725.496.[4]

As noted by the Director, because the transfer provisions of Section 725.496 are not applicable to this case, the controlling regulation for determining carrier's liability is Section 726.203(a). That regulation requires a specific contractual endorsement that must be contained within each policy issued by an insurance carrier providing liability coverage for black lung benefits under the Act. 20 C.F.R. §726.203(a). Under Section 726.203(a), an insurance carrier is liable for the payment of benefits from a disease caused or aggravated by coal dust exposure in the employment of the insured, if the "conditions causing the disease occurs during the policy period, or occurred prior to ([the] effective date [of the policy]) and [the] claim based on such disease is *first filed against the insured* during the policy period." *Id*. (emphasis added).

Since all of the miner's coal mine employment occurred prior to 1970, the work conditions that allegedly caused the miner's disease did not occur within employer's policy period of September 1973 to September 1978. However, we agree with the Director that, insofar as the miner first filed a Part C claim against employer in this case on May 24, 1976, which date falls within the policy period, carrier is liable for benefits under the requirements of Section 726.203(a). Director's Reply Brief at 2.

We reject carrier's argument that the miner's 1970 SSA claim, which was not filed within employer's policy period, is the relevant filing date for purposes of considering carrier's liability under Section 726.203(a). An SSA Part B claim, by definition, is not filed against a coal mine operator. A Part B claim is a claim filed on or before June 30, 1973, which is adjudicated by the SSA and paid for out of general revenues. 30 U.S.C. §§923(a); 925(a); *see also* 30 U.S.C. §901(c). In contrast, a Part C claim is a claim filed on or after January 1, 1974, adjudicated by the Department of Labor, and paid for by the responsible coal operator or the Trust Fund. 30 U.S.C. §932; *see also* 30 U.S.C. 901(c).[5]

---

[4] Because the regulations require that each claim be considered separately to determine whether it is eligible for transfer, *see* 20 C.F.R. §725.496, we reject carrier's assertion that the doctrine of collateral estoppel precludes the Director from contesting the liability of the Black Lung Trust Fund (the Trust Fund) for the instant claims.

[5] The Black Lung Benefits Act of 1972 divided claims into three categories. Part B of the 1972 Act provided that those claims filed before July 1, 1973, were to be administered by the Social Security Administration (SSA) of the Department of Health, Education and Welfare (HEW) and benefits were to be payable from federal funds. *See*

As noted by the Director, "[b]ecause the miner's 1970 SSA claim was paid from general revenues and was therefore not the responsibility of any coal mine operator," it cannot be considered as "a first [claim] filed against the insured" within the meaning of Section 726.203(a). Director's Reply Brief at 2 n. 2.

Moreover, carrier cannot escape liability based on its assertion that the miner's May 7, 1976 Part C claim "merged" with the miner's earlier Part B claim. As noted by the Director, employer's argument reflects a misunderstanding of the regulatory requirements for merger. Director's Response Brief at 2. With regard to merger involving a Part B claim, the Board has held that the date that a claimant elected review of his or her denied Part B claim would be deemed the new filing date of that claim. 30 U.S.C. §945(a)(4); *Chadwick v. Island Creek Coal Co.*, 7 BLR 1-883, 1-893 (1985), *aff'd on recon.*, 8 BLR 1-447 (1986)(*en banc*). If that claimant had also filed a Section 415, 30 U.S.C. §925, transition period claim, or a pre-Reform Act Part C claim, the reviewed Part B claim merged into the earliest claim filed with the DOL. This surviving post-merger claim became the reference point for the determination of the date of entitlement to benefits, the transfer of liability, and the prevention of duplicate payments. *Id*. Where two (or more) Part C claims merge, the operative date of filing is that of the initial Part C claim. *See Lawley v. United States Steel Corp.*, 11 BLR 1-14 (1985); *Tackett v. Howell and Bailey Coal Co.*, 9 BLR 1-181 (1986); *see also* 20 C.F.R. §727.103(c). This date determines which substantive regulations apply, and is also relevant to determining the date that benefits commence. *See* 20 C.F.R. §725.503.

Under the circumstances of this case, when the miner elected review of his denied Part B claim on May 30, 1978, the date of election became the new filing date for that claim. As the miner had already filed a Part C claim on May 7, 1976, the Part B claim merged with the earlier Part C claim. Consequently, as the record establishes that the

---

30 U.S.C. §§921-924; 20 C.F.R. §725.1(b). Part B also provided that those claims filed between July 1, 1973 and December 31, 1973 were to be administered by the Department of Labor (DOL). *See* 30 U.S.C. §925; 20 C.F.R. §§725.1(c), 727.303(b). For these "transition period" claims, any benefits due for time periods prior to January 1, 1974, were to be paid from federal funds, and benefits for any time after that date were to be paid by employers, where designated. *Id*.; *see also Foley v. Director, OWCP*, 7 BLR 1-896 (1985). The final group of claims was designated by Part C of the 1972 Act. *See* 30 U.S.C. §§931-945. Part C claims are those claims that are filed after December 31, 1973. 30 U.S.C. §931. These claims were also administered by DOL and were to be paid by the employers, where designated. *See Director, OWCP v. Goudy*, 771 F.2d 1122, 1125-26, 8 BLR 2-74, 2-77-81 (6th Cir. 1985).

miner's first DOL claim was filed against employer (the insured) on May 7, 1976, and this date falls within the carrier's coverage period of September 1973 to September 1978, we hold that carrier is liable for benefits as a matter of law pursuant to Section 726.203.[6]

[6] Carrier asserts that because there was no statutory or regulatory provision (20 C.F.R. §725.309) allowing for multiple claims at the time that carrier issued its policy to employer, it is improper for carrier to be held liable for benefits in this matter as "the DOL's decision to name [carrier] for the duplicate [and subsequent] claim[s] impermissibly increased [carrier's] liability retroactively." Carrier's Combined Brief at 8-10. Contrary to employer's assertion, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has upheld the validity of the duplicate claims provisions based on the latent and progressive nature of pneumoconiosis. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). Moreover, in the preamble to the revised regulations, the Department of Labor specifically rejected several comments suggesting that it was unfair to impose liability for duplicate claims on the insurance industry, and that liability for claims awarded under 20 C.F.R. §725.309 should transfer to the Trust Fund. *See* 65 Fed. Reg. 79975 (Dec. 20, 2000).

Accordingly, the administrative law judge's Order Granting Motion to Dismiss Carrier and Remand to Director is reversed, the carrier is reinstated as a party to this claim, and the case is remanded to the administrative law judge for consideration of the merits of entitlement.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge